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In This Issue

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The President's Page

By AUGUSTUS F. MACK, JR.
President, Los Angeles Bar Association

President Gus Mack

This space has been used in the past to recognize various elements of the Association for good work on behalf of the profession or the public. Activities of our committees have been applauded, and justifiably so. It would be well for the entire Association to again be aware of the splendid efforts and results from another source—those who make this *Bar Bulletin* possible.

The Bar Bulletin is technically published by the Los Angeles Bar Association, through its Bar Bulletin Committee. However, the real work is performed by Parker & Son, Inc., and its thoughtful employees. Parker's (as they are known to the Bar) does all of the composition, printing, binding and mailing of the Bulletin *without charge to the Association*. Their only return is the nominal receipts from institutional advertising, the good will of the profession and the knowledge that their efforts add to the standing of the Los Angeles Bar Association throughout the land.

Much goes into producing the Bulletin as a finished product. The

Committee members administer editorial policy for the Board of Trustees and they solicit, select and edit material for publication. After material is in manuscript form, Parker's takes over. Manuscript is set in galley and proof read; it is then sent by messenger to the issue editor for double proofing; galley proof is then returned to Parker's and necessary changes made. The issue editor indicates the general make-up of the particular issue, but the time consuming burden of page make-up is again performed by Parker's professionals. Page proof is then sent by messenger to the issue editor and double checked.

After final approval the presses roll. Soon the magazine is bound and mailed by Parker's—mailed not only to our membership of some 3500, but to Law Schools, Law Reviews, Libraries, government officials—many in faraway places. The Bulletin is noted in the Index to Legal Periodicals, a nationwide publication. It is the official voice of this Association and we are greatly obliged to Parker & Son, Inc., and their fine staff for helping make the finished product one of which we can all be proud.

Issue Editor—Joseph L. Wyatt, Jr.

The Cases for and Against Capital Punishment

EDITOR'S NOTE: *Thirty-eight countries in the world do not impose the death penalty for any crime. A great many more countries impose it in one form or another. Of the United States of America, 42 punish some crimes by death, six have abolished the death penalty. California is one of the former, but not without some current soul-searching by its legislature and by interested on-lookers.*

This session A.B. 1225, declaring a six-year moratorium on the death penalty, was introduced by Assemblyman Lester C. McMillan (D., Los Angeles County) and twenty others, and was passed (42-29) and sent to the Senate where it is pending before the Senate Judiciary Committee. As these articles go to press, it faces almost certain death before the Senate, which has already killed a Senate-originated moratorium bill.

Two years ago advocates of abolishment were unable to muster the ten votes necessary to pry out of committee an abolition bill, or even a bill declaring a moratorium for a specific period.

What are the arguments for and against capital punishment? The Los Angeles Bar Bulletin prints brief articles, pro and con, by two writers well informed on the subject.

David S. Smith was a member of the Conference of State Bar Delegates Special Committee on Capital Punishment which reported to the 1956 Conference recommending retention of capital punishment with procedural improvements (none of which are discussed herein).

Dean Robert Kingsley, Dean of the University of Southern California Law School, is chairman of the Subcommittee on Capital Punishment of the Southern Section of the Attorney General's Advisory Committee on Criminal Law Enforcement.

The Case for the Death Penalty

By DAVID S. SMITH*

These comments are presented in summary and outline form concerning retention of the death penalty:

Arguments in favor of abolition or suspension of the death penalty predominantly are twofold:

A. Capital punishment is not a deterrent;

B. Capital punishment is contrary to fundamental religious concepts.

First, as to point (a)—"no deterrent," this conclusion is predicated upon a fallacious and weak premise; a fortiori, the conclusion is no less fallacious and weak. The source of the premise stems from interviews with persons convicted of crimes punishable by death who have stated the death penalty did not deter them. It is self-evident that the death penalty did not deter these few persons. Hence questions seeking answers as to whether the death penalty was a deterrent, can as readily be ascertained by the prior felonious acts of the convicted. Those persons from whom the premise originates constitute an infinitesimally small segment of society—fortunately. The fact that these few were not deterred supplies *no* answer to the number who have been, are, and will be deterred from committing criminal offenses punishable by death. The inadequacy of the premise is further demonstrated by the following:

a. Victims have been removed from a capital punishment state to a non-capital punishment state to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be killers. Which person can approximate, much less accurately state, how many lives have thus been saved.

b. Criminals who committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor or captors though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve a life sentence, but not risk the death penalty. Again innocent were spared.

c. Criminals about to commit certain offenses refrained from carrying deadly weapons. On capture, answers to questions con-

* LL.B. Loyola Univ., past president, Lawyers Club of Los Angeles (1954); past chairman, Federal Indigent Defense Committee.

cerning absence of such weapons indicated a desire to avoid more serious punishment for carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

d. Some states which previously abolished the death penalty have found it necessary to re-adopt it for its deterrent value.

Additional affirmative matter in support of the death penalty exists, but is not here cited in the interest of brevity.

From a religious point of view (point "b" above), authority on religious matters have not only justified the death penalty, but state it is required. The Right Rev. R. C. Mortimer in his book on "Christian Ethics," states:

> ". . . if the death of a malefactor is necessary for the good of society, it is right to kill him. The correction of the offender is not the sole purpose of punishment. In punishment there are three elements or purposes, the vindictive, the deterrent, and the reformative. Vindictive punishment has nothing to do with revenge. It is derived from the Latin word for punishment, vindicta. And this perhaps suggests that we have here the dominant element in the whole concept of punishment. Vindictive punishment is said to be a matter of justice, of redressing the balance which an act of injustice has disturbed. It is something which is due from, a debt which has been incurred by, him who has been guilty of an offense. The sense of justice innate in all men appears to demand that wrong-doers should be punished; and if they are not punished we say that 'justice has not been done.' Over and above the restoration or making good of whatever damage the act of wrong-doing may have occasioned, and over and above a sincere purpose of amendment, a resolution never to do that kind of thing again, justice appears to demand that something further be inflicted upon and accepted by the wrong-doer as a sort of payment or reparation, not for the consequence of his evil action but for the evil action itself. It is this conviction which underlies the lex talionis, the eye for an eye and tooth for a tooth. And it is probably the fundamental element in punishment."

The same author holds that the reformative purpose of punishment exists in a death sentence in that condemned criminals not infrequently are "reformed" in the sense that they accept the gravity of their crime, the justice of their penalty, and, in effect, make their peace with God.

On the subject of the deterrent purpose of capital punishment, he states:

"Insofar as the argument against capital punishment turns on its lack of deterring power, the question is one of fact and experience. That it does not deter in all cases is of course obvious. But the strange argument is sometimes advanced that what is, ex hypothesi, regarded as a lesser punishment, imprisonment for life, has the same deterring power as the greater punishment of death. That is, that men fear and are restrained by the less fearful as much as by the more fearful. But, however, this may be the important thing from the ethical point of view is the universal admission that the community has the right to protect itself against potential criminals by the threat of punishment, and the consequent right—necessary to give to the threat its effective restraining power—of inflicting the punishment when it has been incurred."

The report of the Royal Commission of England on Capital Punishment states: "The function of all punishment is threefold (a) retribution (b) deterrence and (c) reformation."

The term "retribution" may sometimes mean vengeance, and other times reprobation. The vengeance concept is outmoded. However, the reprobation concept is stated as follows:

"Morever, we think it must be recognized that there is a strong and widespread demand for retribution in the sense of reprobation—not always unmixed in the popular mind with that of atonement and expiation. As Lord Justice Denning put it: 'The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime; and from this point of view, there are some murders which in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.'"

The report goes on further to state:

"We recognize that it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty,

or indeed of any form of punishment. The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so."

James Fitzjames Stephen nearly a hundred years ago, said:

"No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to certain inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has, will he give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly."

There are several motives why abolition or suspension of the death penalty is urged by some of its proponents.

(a) Sincere belief in the objective;

(b) A bandwagon spirit; and/or,

(c) Limelight because of publicity attendant to the issue.

Motives (b) and (c) need no further comment. However, as to (a), even the sincere should consider if the cold, premeditated and intentional killer of an innocent human, whether man, woman, or child, merits the effort now being exerted to save his life or whether some of this same expenditure of time and effort might more advantageously be utilized to deter and punish crime and/or help the victims of crime. From a social point of view, the victims of crime and/or their dependents could use some of this effort on their behalf. They certainly appear the more deserving.

The Case Against Capital Punishment

By ROBERT KINGSLEY*

The problem of abolition or retention of capital punishment has, these past years, produced a substantial quantity of writing—much of it contributing more heat than light, and almost all of it based on *a priori* reasoning and not on valid research or investigation.[1]

I

I think that we can all start from the common premise that the infliction of the death penalty involves such a solemn responsibility, and involves conduct patently so irremedial in case of potential human error in our judicial processes, that it can be justified only on grounds of clear necessity for public protection.

But the simple fact is that we do not know whether or not capital punishment is really necessary.

(1) Although the accuracy of criminal statistics has improved greatly in the past quarter century, we are still dependent on reports from individual law enforcement officials and prosecutors. To say that these thousands of persons vary widely both in their accuracy and in their bases of classification and report is to understate the situation. And we have no reliable index of capital crimes as such. To get any figures, we must take statistics for all homicides as a group (a figure initially suspect for the reasons indicated) and then adopt an arbitrary percentage factor for the first degree murders. Similar (though perhaps not quite so extreme) problems exist in attempting to get figures for other crimes (such as rape, kidnapping, etc.) to which the death penalty is sometimes applied.

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*Dean, School of Law, University of Southern California.

[1]An excellent survey of the problem, with a marshalling of arguments pro and con will be found in Younger, Capital Punishment: A Sharp Medicine Reconsidered, 42 A.B.A.Jour. 113 (1956).

The best overall discussions can be found in the symposium, "Murder and the Penalty of Death" in 284 Annals of the American Academy of Political and Social Science (Nov. 1952), and in the Report of the Royal Commission on Capital Punishment (1949-1953).

I have not tried to document each statement in this article. For those interested, such documentation can be found in the three sources above cited.

(2) What little we do know about the psychology of crimes teaches us that its incidence is affected by many factors—local mores, the local level of education and general culture, the racial and cultural temperament of the community are among the most important. But, if we are to draw any usable conclusions from statistical data from states having and not having the death penalty, we must first be sure that all these other factors are at a common level. Again, the careful field study involved in such an analysis has yet to be made.

(3) Further we know almost nothing about the real deterrent effect of the death penalty. We can rationally assume that it did not deter those to whom it ultimately was applied. But how many of those were influenced by (to them) reasonable expectations of non-detection or of non-conviction? And how many non-murderers were actually deterred by the existence of the possible penalty? Some people are simply non-deterrable at all; others are deterred by sanctions which most of us would regard as minor. Again, much careful study of the psychology of mankind must be made before we can say with assurance that the threat of death, *and only the threat of death*, operates to reduce the incidence of the kind of crime with which we are concerned. On both sides of the issue, men can cite—and do cite—individual cases in which a person says that the existence or non-existence of the death penalty was the *sole* factor to influence his conduct. But if we know anything about criminal psychology, it is that personal evaluation by a criminal of his motivation is the most untrustworthy of data. Few of us are really conscious of our own motivations; fewer of us tell the truth even about what we think we know of ourselves.

In short, we do not know that capital punishment is necessary; nor do we know that it is not. But if we do not know, I submit, we cannot justify so extreme a sanction on a mere insupportable guess.

II

One further comment seems appropriate. The use of the death penalty in California is inordinately expensive.

(1) So long as a prosecutor indicates that he will urge the death penalty, no responsible defense counsel is likely to adopt any tactic other than to plead not guilty (and often not guilty by reason of insanity) in the hope that he can secure either a murder second

or a recommendation of life sentence. If, after trial, the death sentence is imposed, the law (for reasons rooted in our experience) provides an automatic appeal to the supreme court. The result is that cases are tried where a guilty plea would otherwise be made, and convictions are appealed although defense counsel, on the record at the trial, has no hope of reversal. The cost, in judicial time alone, in addition to the other expenses, is appalling.

(2) Once a death sentence is affirmed, then begins the all too familiar process of writs of habeas corpus, writs of coram nobis, and all the other devices to delay, and perhaps to upset, the result. Not a year in my experience since I came to California 29 years ago has been without at least one such case. Chessman is not the first, nor the last, of the procession to produce this sorry spectacle of delays and expense. It is significant that, although the process is equally available to prisoners not under sentence of death, it is only in the capital cases that it is invoked.

(3) Finally, the immediate expense of executions themselves, and the extra costs of operation of "death row" during the long period of appeal and collateral attack, is high. Our public officers have stated that the costs of Chessman's cases alone would have maintained all of our capital prisoners for the entire period of their respective life sentences.

If it were clear that capital punishment were actually necessary, then these costs could be accepted as an inevitable incident of that necessity. But, lacking as we do, that assurance of absolute need, they become an unnecessary addition to governmental costs already too high.

III

As this is written, the Assembly has approved a moratorium, for a short period and limited in its extent, on capital punishment. To my mind this is a step in the right direction. The experience under such conditions will give us *some* basis for judging the effect of an alternative penalty. If the fears of the advocates of capital punishment are borne out, the moratorium can be lifted with great speed; if they are not borne out, we will have an objective answer to the question of the necessity of the extreme penalty. Although they do not provide proof, the experiences of states without capital punishment suggest strongly that we need have no fear of the experiment.

Scanning the Minutes and Reports

(EDITOR'S NOTE: The Bulletin Committee receives copies of the minutes of the meetings of the Board of Trustees of the Los Angeles Bar Association and the reports of the various committees of the Association. From time to time the Bulletin will present in this space digests of items from the minutes and reports which are considered by the Editors to be of general interest to the membership.)

The Board of Trustees adopted a resolution expressing approval of Senate Constitutional Amendment No. 16, which provides that no appointment by the Governor of a judge of the municipal court or the superior court shall be effective unless approved by the qualifications commission.

Other pending legislation has been approved by resolution of the Board, including the following:

Senate Bill 685. This measure would add Section 486 to, and amend Sections 488 and 488.5 of the Vehicle Code so as to make the filing of accident reports by peace officers a requirement, and to permit the examination of such reports immediately by any person having a proper interest therein, including drivers, injured persons, vehicle owners, or their representatives. This will make it possible to obtain important information which, without such change in the law, would not be available until six months following the date of the accident or the termination of criminal proceedings, if any are brought.

Senate Bill 1063. This measure would amend Section 417 of the Code of Civil Procedure to permit litigants to obtain a personal judgment against a non-resident defendant personally served outside of the state who at the time the cause of action arose was a resident of California. This would correct deficiencies in the present statute, which permits the obtaining of such a judgment against a defendant if he was a resident either at the time of the commencement of the action or at the time of service of process.

Federal Legislation. President Mack advised the Board that Attorney General Brownell has submitted to Congress a measure which will provide for the appointment of public defenders by the

District Courts of the United States, either as full time or part time officers, as the volume of work in the respective districts may require. The Board approved this proposal and authorized the President to take appropriate steps to further the legislation.

* * *

"TURNABOUT NOT FAIR PLAY"

In San Francisco a young woman has been given a 15 day suspended sentence for violating a city masquerade ordinance because of wearing men's clothing. The court took the position that it would not countenance the wearing of male attire by women, pointing out that if this were permitted, there would be no argument against the wearing of women's clothes by men, and think of the consequences. There was a titter from the courtroom, proving that some thinking was being done.

TAX REMINDER

PROPER DRAFTING OF TAX PARTICIPATION CLAUSE IN AGREEMENT TO PURCHASE STOCKHOLDER'S INTEREST IN CLOSELY HELD CORPORATION.

By MAXWELL E. GREENBERG, Esq.*

An application of "preventive law" techniques which should be of general interest to the Bar is the proper drafting of a "tax participation" clause in an agreement by which a corporation, or a stockholder in a closely held corporation, purchases capital stock of the corporation from another stockholder. The problem arises after a purchase of stock by reason of the assessment by the Internal Revenue Service of a tax deficiency against the corporation for the earlier period in which the stock was owned by the former stockholder. The burden of the resulting decrease in the value of the capital stock of course falls upon the shareholders at the time of the assessment, in the absence of an agreement whereby the selling shareholder reimburses the buyer for a pro rata share of the deficiency.

The problem can and should be met by a *carefully drawn* tax participation clause in the Agreement of Purchase. Care must be taken to meet the following pitfalls: First, the extent of liability should be carefully defined. For example, it is unclear whether the word "deficiency" incudes interest and penalties as well as the principal amount of the underpayment. (For one definition of "deficiency," see IRC Section 6211).

The second pitfall is the difficulty of proof in a later suit by the corporation against the seller for the agreed portion of the deficiency. Among other problems of proof which should be kept in mind when drafting such a deficiency clause is the fact that the Internal Revenue Service and subordinate employees are ordinarily instructed not to testify even though subpoenaed as deposition or trial witnesses, in cases in which the United States does not have an interest. (See: Mim. 6727, 1952—1 Cum. Bull. 234; *Boske v. Comingore,* 177 U.S. 459; and Article 80 of Treasury Regulation 12.)

*Member of the Taxation Committee Los Angeles Bar Association; A.B., U.C.L.A. 1941; L.L.B., Harvard University 1944 (1949); Member of Beverly Hills, Los Angeles and American Bar Associations.

It is suggested that there be an agreement that the Internal Revenue Service's notice of deficiency and the corporation's cancelled checks to the Internal Revenue Service be *prima facie* proof of any deficiency assessed. If deficiencies are a substantial possibility and the seller is willing, a portion of the agreed payment price for the stock should be withheld by the buyer (or held in escrow) as a security fund to cover any estimated deficiency and interest thereon.

In conclusion, a deficiency clause similar to the following is suggested (bracketed material is optional):

> "In the event the corporation shall become liable for any deficiencies (as hereinafter defined) in federal [or state] income [excess profits, or excise] taxes which were not yet assessed nor reserved against nor reflected in the accounting statements of the corporation at the time of determining the purchase price of the shares transferred herein, and said deficiencies are assessed for a fiscal period ending prior to..... [insert either the date of the agreement or the cut-off date of stock ownership], or which retroactively applied to or concern a fiscal period ending prior to said date, then the seller agrees to remit his *pro rata* portion thereof (based on the percentage of stock which seller owned in the corporation at the time of the execution of this agreement) within 10 days after receipt of written notice of said deficiency. 'Deficiency' is hereby defined as including underpayment of taxes, interest thereon and penalties assessed in connection with such underpayment of taxes. It is hereby agreed that proof of receipt of statutory notice of deficiency from the Internal Revenue Service and introduction into evidence of cancelled checks payable to the Internal Revenue Service and endorsed by the Internal Revenue Service and bearing a notation to the effect that the checks are payable for deficiencies (as defined above) allocable to particular fiscal periods, shall be deemed *prima facie* evidence of assessment and payment of such deficiencies for such periods, for purposes of this Agreement."

The above suggested paragraph does not deal with the problems of liability for partial fiscal periods or possible transferee liability of the corporation, both of which must be considered and dealt with expressly in appropriate cases.

Special Report of the Holbrook Courts Survey

This is the conclusion of this Report, the first portions of which appeared in the March and April issues. It contains the recommendations of the special committee appointed to study James G. Holbrook's "A Survey of Metropolitan Trial Courts — Los Angeles Area." These recommendations have been approved by the Board of Trustees, except in the few instances where the contrary is indicated.

Recommendation PP — Special Pretrial Department

The Survey recommends that during the initial use of pretrial conferences a special department should be created to handle them exclusively.

The Committee advises no action with respect to this recommendation. The Superior Court has, as of January 1, 1957, created four special departments to handle pretrials exclusively. The future use of such pretrial departments should depend upon whether the present system is found satisfactory after a trial period. It is too early to draw any conclusions about the present system.

Recommendation QQ — County Public Defender to Handle Felony Preliminaries

The Survey recommends that the County Public Defender's office, rather than the City Public Defender, should handle all felony preliminaries. He proposes further that with the adoption of this practice pleas of guilty should be accepted in the Municipal Court and immediately certified to the Superior Court and a date set for probation hearing and sentencing without a second arraignment.

The Committee approves. It is noted, however, that the reference to "all felony preliminaries" is misleading. The intention is that the County Public Defender should handle felony preliminaries to the exclusion of the City Public Defender. It is, of course, not intended that the County Public Defender handle the felony preliminary for any defendant who has his own counsel or who does not desire the services of a public defender.

Recommendation RR — Investigators for City Public Defender's Office

The Survey recommends that the Los Angeles City Public Defender's office should be permitted to employ a reasonable number of investigators to assist in preparation for trial.

The Committee approves.

Recommendation SS — Traffic Records in the Municipal Courts

(1) The Survey recommends that Municipal Courts should maintain a master traffic ticket control register similar to that used in the Los Angeles Municipal Court.

The Committee approves.

(2) The Survey recommends that Municipal Courts should maintain for each traffic offender a record of all moving offenses during a twelve months period, so as to give the court notice of prior offenses.

The Committee approves.

(3) The Survey recommends that Municipal Courts should make available annual computations of the total number of cancelled traffic citations.

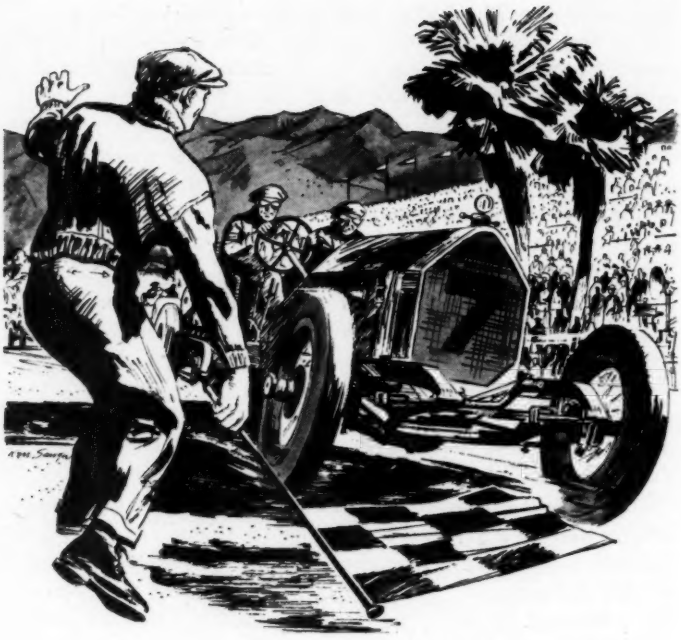
The Committee approves.

(4) The Survey recommends that Municipal Courts should adopt the uniform traffic ticket recommended by the National Traffic Institute.

The Committee disapproves. The Los Angeles Police Department believes that the ticket used here is superior to the National Traffic Institute form because the latter does not provide space for a detailed statement by the officer as to the facts of the violation. The advantage claimed for the uniform ticket is that it contains a form of complaint printed on the reverse side of the citation. In Los Angeles, no complaint is prepared unless a defendant fails to appear or unless he appears and pleads not guilty. When a complaint is prepared, it is in a relatively simple form. The extra work of having to prepare separate complaints is not a great burden, when weighed against the disadvantage of not having adequate writing space on the National citation.

The proposal to use the National Traffic Institute form is not a new one. It was studied several years ago by the Los Angeles Bar Association Committee on Criminal Law and Procedure, who recommended against its adoption. The people who have primary responsibility for the efficiency of the traffic citation system, namely, the Police Department, the City Attorney and the Municipal Court, are aware of the claimed advantages of the uniform ticket and have not seen fit to adopt it. Under the circumstances, there seems to be no reason for the Los Angeles Bar Association to advocate any such change.

(5) The Survey recommends that Municipal Courts should dis-



SANTA MONICA ROAD RACES

Beginning in 1909, both the internationally famous Grand Prix and Vanderbilt Cup auto road races were held in Santa Monica for several years. Competing in these exciting events on city streets were such memorable drivers as Ralph De Palma, Teddy Tetzlaff, Earl Cooper, Barney Oldfield, Cliff Durant, Bob Burman and Eddie Pullen.

This Bank's Trust Service had been operating for six years when these races began. For Trust needs it has been Security-First ever since.

continue acceptance of traffic bail within the courtroom and provide for payment at some other place.

The Committee approves in principle, facilities and custodial care permitting.

Recommendation TT — Uniform Traffic Bail Schedule

The Survey recommends that Municipal Courts should adopt a uniform traffic bail schedule throughout the county for non-custody cases as well as for custody cases.

The Committee approves.

Recommendation UU — Traffic Dockets: Los Angeles Municipal Court

The Survey recommends that the Los Angeles Municipal Court Clerk should reduce by combination thereof the many traffic dockets now kept.

The Committee approves.

Recommendation VV — Sentencing in Misdemeanor Cases

The Survey recommends that at periodic intervals sentences imposed by judges in misdemeanor cases in which there is no fixed bail schedule should be tabulated and circulated among the judges.

The Committee approves, with qualifications.

In the Los Angeles Judicial District there is a fixed bail schedule for all misdemeanor cases. Therefore, this recommendation by its terms would not apply to the Los Angeles Division. A majority of the Committee believes it is desirable to make some tabulation of the sentences imposed by different judges in the major misdemeanor cases so that each judge will have an opportunity to observe the range of sentences imposed by others in cases involving the same offense. If such tabulation is valuable, it should be used for the guidance of the judges even though there is a fixed bail schedule for each offense. The use of such tabulations probably would be of minimum benefit with respect to minor offenses such as parking violations, and hence the Committee's recommendation is directed to major misdemeanors. The Committee therefore recommends that Professor Holbrook's recommendation be modified to read as follows: "At periodic intervals sentences imposed by judges in *major* misdemeanor cases should be tabulated by types of cases on either a monthly or quarterly basis and circulated among the judges. If this is not done for all such cases, at least selected comparable cases should be so tabulated."

Recommendation WW — Destruction of Records in the Municipal Courts

The Survey recommends that all municipal courts in this county

should be permitted to microfilm records and destroy records of all cases five years after their ultimate disposition.

The Committee disapproves. The present law authorizes the destruction of municipal court case files after 15 years. Docket books are kept indefinitely. Thus, if files were microfilmed after 5 years the county would save the expense of only 10 years' storage. The Clerk of the Municipal Court states that the cost of microfilming would be considerably more than the cost of storage of the files for the 10-year period. There might be some economy in microfilming the dockets rather than keeping them indefinitely. However, microfilming necessarily makes these records much more difficult to use. The dockets themselves, being considerably less bulky than the files, seem to the Committee not to present such a serious storage problem as to justify microfilming.

Consideration might be given to the adoption of a destruction policy entirely different from the one presently authorized by law. For example, all files might be microfilmed after 5 years and the microfilms retained indefinitely. If longer retention of files is desired the expense of microfilming might be justified. However, the Sur-

vey does not propose the retention of any records which are subject to destruction under present law, and we therefore feel that any consideration of a longer retention policy is outside the scope of this Committee's work.

Recommendation XX — Municipal Court Minutes

The Survey recommends that all of the outlying municipal courts should draft all minutes of any proceedings in the courtroom in legible form, which draft should be the final one and should eliminate the necessity for duplicate or triplicate entries.

The Committee approves.

Recommendation YY — Mechanical Means of Record Keeping: Los Angeles Municipal Court

The Survey recommends that the Los Angeles Municipal Court should employ IBM machines or other appropriate mechanical means for indexing cases and at the same time recording other data; and that the court should also employ mechanical means for reproduction of documents to a greater extent than at present.

The Committee approves except for the words "IBM machines or other," since there is no intention to recommend a manufacturer by name. This Committee is informed that the Municipal Court Clerk has been working on this problem and it is only a matter of time until equipment is purchased and the recommendation is put into effect.

Recommendation ZZ — Location of Files: Los Angeles Municipal Court

The Survey recommends that the Los Angeles Municipal Court should permit all files of the four outlying divisions to remain at the division where filed until after final disposition; and that the division where filing took place should then hear law and motion matters.

The Committee approves provided that a single index of all actions pending both at the Civic Center and at the outlying divisions be maintained at the Civic Center. Such an index is maintained at the present time, and the Committee assumes that this index will be continued even though the files are dispersed in the outlying divisions.

The Committee also feels that after this practice is followed for an experimental period, the court may find that duplicate filings are desirable. Files should be available at branch courthouses even if it does result in a duplicate filing system, as in the Superior Court.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

An educational 16 mm film, "The Medical Witness," is now available to local bar associations. The film is based upon an original dramatization presented by members of the American Medical Association and the American Bar Association. It is the first of a series of medico-legal films to be produced by the William S. Merrill Company, a Cincinnati, Ohio, pharmaceutical firm, as a service to doctors and lawyers. Under a contractual arrangement with the producer, both the AMA and the ABA reviews all scripts prior to production.

* * *

The following notice appeared a few months ago in *Manitoba Bar News*:

THIRD ANNUAL BONSPIEL

"The Portage la Prairie Bar is again sponsoring the Manitoba Bar Association Bonspiel. . . .

"Make up your rink, if possible. If not, you can be placed on a rink."

Can you tell—without going to the dictionary—just what these brothers-in-law were up to?

* * *

"The office of the United States Attorney for the Southern District of New York . . . is one of the busiest law offices in the country employing at the present time 55 Assistant United States Attorneys and 8 other lawyers on special payrolls. We have only one client but it is the most litigious in the world—the United States of America. . . ."—Paul W. Williams, United States Attorney for the Southern District of New York in an article on "Legal Internship" in the *Harvard Law Bulletin*.

* * *

"We're getting smarter in **Texas**. . . . We are finally learning that it's easier to pick a tourist—particularly a convention tourist

—than it is to pick cotton. And it's a lot more fun. I've tried both, and I know."—From an address by John Ben Shepperd, Attorney General of Texas, at the 1956 ABA convention.

* * *

The **Brooklyn** Bar Association holds an annual Theatre Party. This year it reserved the center section of the orchestra at the Henry Miller Theatre for "The Reluctant Debutante."

* * *

"Never forget that words are the raw material of our profession and that the possession of a good literary style which enables you to make effective use of that material is one of the most valuable of all professional equipment. You should strive not only for a mastery of law but also of letters in order that you may use with ease and freedom and distinction the vehicle of language in which your opinions and your arguments must be conveyed."—Arthur Littleton, in a "Symposium: Hints to the Newly Admitted" in *The Shingle* of the Philadelphia Bar Association.

* * *

"The motorist approached the coroner at 60 miles per hour."—From a charge to the jury reported by *The Shingle* of the Philadelphia Bar Association.

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BOSTON BAR BOWS TO PROGRESS

The venerable *Boston Bar Bulletin*, beset by rising deficits, went quietly out of existence in the waning days of 1956. It has been succeeded by the *Boston Bar Journal* which, with shiny paper, photographs and color, is expected to lure more advertisers. The **Boston** Bar Association hopes that its new publication will be "more in tune with the times."

Opinion of Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 239

(February 8, 1957)

INSURANCE. Attorney representing client on possible liability in excess of policy limits may negotiate directly re settlement only under certain conditions.

A lawyer has directed the following inquiry to the Committee:

"The attorney represents the defendant in an automobile accident case against whom suit has been filed in excess of policy limits. The insurance company has engaged other counsel to represent their interests and the attorney is employed to protect the interests of the defendant so far as they may be involved by reason of the prayer being in excess of his insurance limits. The attorney is not on the record in the litigation and is employed only by the defendant in an advisory capacity prior to actual trial. Under these circumstances may the attorney properly contact counsel for the plaintiff, advise them of policy limits and engage in such negotiations as may be necessary in an effort to reduce the demand of the plaintiff, for settlement purposes, to a figure within the policy limits? It is assumed that if such negotiations are held, they will be carried on independently by the attorney for the defendant and not by counsel for the insurance company."

In 26 California State Bar Journal (1951), at page 362, the writer states:

"Good faith on the part of the insurance carrier requires a full disclosure to the insured of the excess problem and the progress of settlement negotiations . . .",

and further:

". . . a conflict of interests between the assured and the insurance company arises immediately upon the filing of a complaint containing a prayer for damages in excess of the policy limits. The attorney retained by the insurance company is also the attorney for the assured and owes to both 'the high duties imposed by statute (Bus. & Prof. Code, Sec. 6068) and by the rules governing professional conduct.'" (Citing Pennix v. Winton, 61 C.A.2d 761, 773 (1943).) "It seems

clear that counsel must immediately advise both the assured and the insurance company of the conflict presented. If the assured then elects not to secure the services of his own attorney, counsel must so advise as to the progress of settlement negotiations and other matters which could possibly affect his personal liability."

Canon 7 of the Canons of Professional Ethics of the American Bar Association, states in part:

"When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask client to relieve him."

Applying the foregoing principles to the present inquiry, the Committee is of the opinion that it would be proper for the assured's attorney on the excess to contact counsel for the plaintiff, advising plaintiff's counsel of the policy limits, and attempt to negotiate a settlement within the policy limits, provided first:

1. He has advised the carrier's counsel of his representation of the assured on the excess; and

2. He has sought of and been refused by carrier's counsel, permission to negotiate directly with plaintiff's attorney; and

3. Upon such refusal he has then fully advised the client and a conference has then been had between client, carrier's attorney, and attorney on the excess, at which the conflict of opinion and the rights and duties of client and of the carrier under the particular policy of insurance are frankly discussed, and the client being fully advised, and it appearing that such action will not prejudice client's right to representation and protection from the carrier up to the limits of the policy, or if so, that the client understands and appreciates the risks, and the client then authorizes attorney on the excess to proceed with such negotiations with plaintiff's counsel; and

4. He does not attempt to quote to plaintiff's attorney any specific settlement figure within the policy limits, without the prior consent of the carrier's counsel.

This opinion, like all opinions of this Committee, is advisory only (By-laws, Art. X, Sec. 3).

How Would You Explain This One?

(COMMENT—APPELLATE PROCEDURE)

Recently, Presiding Justice Shinn of the Second District, Division 3, said (rather resignedly, we think):

> "We have slight hope that our repeated admonitions will bear fruit. Unfortunately, they will come to the attention of those practitioners, alone, who are accustomed to reading law, and for them our remarks are not intended."

(Estate of Good, 146 A.C.A. 762, 765 (Dec. 11, 1956.)

On the questionable premise that this periodical is more widely read than the advance sheets, we shall endeavor to give Justice Shinn's complaint wider circulation. For there was no doubt that the judge was annoyed. Here's his gripe (*idem* at 763-764):

> "We have had occasion to remark before in a similar situation that a claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondent. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner. * * *
>
> For the reasons stated we decline to consider the claim that the finding of the exercise of undue influence was without support in the evidence. That finding must stand as if it were not challenged at all."
>
> And it did.

This campaign is no one-shot effort on the part of Mr. Justice Shinn. He did the same thing about a week later in *Hickson v. Thielman,* 147 A.C.A. 10, 14 (Dec. 17, 1956):

> "The first contention of defendants is that the findings are unsupported by the evidence. In this connection, we repeat what every lawyer should know, namely, that when an appellant urges the insufficiency of the evidence to support the findings, it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot

shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.

* * * Appellants have made no attempt to make a fair statement, or indeed, anything approaching a fair statement of the evidence claimed to be insufficient. Their failure to do so will be deemed tantamount to a concession that the evidence supports the findings."

Counsel cannot say that fair warning wasn't given. In *Goldring v. Goldring,* 94 Cal. App.2d 643, 645 (1949), the P. J. said:

"... (W)e do now give notice that henceforth it will be the practice of this court to disregard claims of insufficiency of the evidence even though that be the only ground of appeal, where the appellant has failed to make a satisfactory statement in the opening brief, or a supplement thereto, of the evidence claimed to be insufficient, with transcript references. Counsel who ignore the rule may expect affirmance of the judgment or order appealed from in proper cases."

While Mr. Presiding Justice Shinn has vented his displeasure more obtrusively than some of the other divisions and districts, there is no doubt that they feel the same way about it. See, *e. g.,*

People v. Johnson, 136 Cal. App. 2d 665, 671 (2d Dist., Div. 1, 1955);

Grayson v. Grayson, 132 Cal. App. 2d 471, 472 (2d Dist., Div. 2, 1955);

Kruckow v. Lesser, 111 Cal App. 2d 198, 200 (2d Dist., Div. 1, 1952);

McCosker v. McCosker, 122 Cal. App. 2d 498, 500 (3d Dist., 1954).

And Justice Shinn hasn't limited his efforts to the cases first

cited, either. See, *e. g.,*

Elliott v. Rodeo Land & Water Co., 141 Cal. App. 2d 404, 410 (1956);

People v. Shannon, 110 Cal. App. 2d 153, 155 (1952);

Morrell v. Clark, 106 Cal. App. 2d 198, 201 (1951).

We can think of at least two questions for lawyers to ponder:

1. If you represent a respondent, and appellant files a brief which "shirk[s] his reponsibility," dare you point this out, cite *Good* and *Golding,* and rest? Can you move to dismiss the appeal, or to have the offending brief stricken under Rule 18? Or does caution and cowardice force you to answer appellant's ill-supported claim on the merits?

2. If you represent the hapless appellant, losing the appeal is bad enough. But suppose your client read the appellate opinion. How would you explain it to him?

Small Local Homes for Seniles Advocated by Psychopathic Committee

THE Psychopathic Committee of the Los Angeles Bar Association, through Steadman G. Smith, its chairman, has offered a suggestion for lessening the expense of administering aid and healing to citizens suffering from mental illness. If the overall per capita expense can be decreased, the program can be made much more effective.

For several years, it has been observed that many of our State Institutions for mentally ill persons are inhabited by large numbers of elderly persons whose only complaint is that they have grown old and are in need of some care and supervision in addition to only the usual amount of medical attention required by many of similar ages. Thus too large a percentage of the space in institutions is occupied by these "Oldsters" who are not actually in need of the expensive facilities offered by this State to those patients who need intensive treatment for mental illness.

The cost for maintaining a mentally ill patient under certain circumstances can amount to $23.00 per day, whereas the average cost of maintaining an oldster in adequate homes by Los Angeles

County can be as low as $83.00 per month. Thus we can see that cooperation between the State of California which offers assistance to the mentally ill, and the forty-eight counties of this State which care for the needy can result in great overall savings to the taxpayer. The inmates could be housed close to their friends and relatives, thereby contributing to their happiness.

Members of this Committee have long realized the need for and have recommended an entire new redraft of those portions of Division VI of the Welfare and Institutions Code having to do with the classification, commitment, care and treatment of mentally ill persons. This Committee feels that our State Legislation is outmoded, disjointed, repetitious and antiquated, but that the administration under it is exceptionally good. Repeated efforts have been made to interest the Legislative Reference Council, State Bar, Judicial Council and others in this huge task. Efforts along these lines are now being rewarded by the lively and intelligent interest of the State Bar Committee on Administration of Justice.

More particularly, certain of our own members have now stated they feel the time is right to correlate and organize the material collected by us over the past five years and compile it into an act to be proposed by our own Bar Association Committee. This is a tremendous undertaking, but one very worthwhile.